UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICHOLAS M. MARTIN, on behalf of himself and others similarly situated, Plaintiff, vs. JTH TAX, INC., doing business as Liberty Tax Service, Defendant.	)	No. 13 C 6923 Chicago, Illinois September 16, 2015 12:30 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS -
Final Approval Hearing
BEFORE THE HONORABLE MANISH S. SHAH

APPEARANCES:

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Also Present: Mr. Nicholas M. Martin, Plaintiff
Ms. Kelly Kratz, Dahl Administration

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(Proceedings heard in open court:)

THE CLERK: 13 C 6923, Martin versus JTH Tax.

MS. HANSON: Good afternoon, Your Honor. Rebecca Hanson on behalf of the defendant.

MR. BURKE: Good afternoon, Judge. Alexander Burke for the plaintiff.

MR. MAROVITCH: Good morning. Dan Marovitch for the plaintiff.

MR. BURKE: And also with us today, we have Nicholas Martin, the plaintiff, is here. And in the gallery, Your Honor, is Kelly Kratz, who's a representative from our class administrator, Dahl Administration, to answer any questions Your Honor may have.

THE COURT: Okay. Good afternoon. We're here for a final approval hearing on the proposed settlement.

I have the plaintiff's motion for final approval; I have the motion for attorneys' fees; I have the objections of Mr. Taishoff, T-a-i-s-h-o-f-f, Ms. Exum, E-x-u-m, Ms. Russell; the letter potentially objecting/potentially excluding Mr. Yoder; and then the recent correspondence, both from Mr. Taishoff and Ms. Exum.

Are there any other materials that I have and should acknowledge that I have and have reviewed?

MR. BURKE: Judge, there is a fee petition that the plaintiff filed --

THE COURT: Right.

MR. BURKE: -- some time ago. And I believe that is all.

THE COURT: Okay.

MR. BURKE: I did have some correspondence with Ms. Exum over the last few days, but I am not intending to submit that for the record unless I need to.

THE COURT: Okay. Okay. No. And I did have the fee petition as well. So I do believe I have reviewed everything.

We're also here for a hearing. No other participants have appeared today, so there are no objectors present, although this is the opportunity for any objectors to present additional objections or arguments.

I did notice in the e-mail correspondence between counsel and Mr. Taishoff where he ultimately sent the affidavit, his supplemental affidavit. I think counsel told him that the hearing was set for 11:00 a.m. Central time, but the hearing is actually at 12:30 p.m. Central time.

MR. BURKE: Yes.

THE COURT: Luckily, Mr. Taishoff said he didn't have anything further that he wanted to say, so there was no harm done there in the communication about the time. I find that he knows full well that this hearing is happening and has had abundant opportunity to have his views expressed.

Do the parties want to present any additional

evidence other than what's in the papers? And is there any update on the number of claims that we should talk about now?

MR. BURKE: We have updates on numbers, and I do have one suggestion or request.

I did -- I should notify the Court that the mailings to the three objectors were sent late. It was my fault. I filed the brief on a Friday evening and did not remember to mail those documents. So when I realized that -- when I received Ms. Exum's submission on Monday, I got on the phone and I called all three. I called Mr. Yoder as well, although I didn't reach him. I reached Mr. Taishoff, Ms. Exum, and Ms. Russell.

Both Ms. Exum and Mr. Taishoff indicated that -- I offered to ask for extra time for them to submit anything they wanted to. There's nothing allowed in the prior orders for a reply brief or anything like that, but I thought that it was equitable to at least suggest this.

Two class members indicated they did not want extra time. Ms. Russell requested that I ask for an extra two weeks for her to submit something, and so the date that we came up with was September 28th.

I have conferred with defense counsel, and defense counsel does not oppose this request, and I do not oppose the request. Again, there was no allotment in the preliminary approval papers for a reply brief, but I thought that it was

the right thing to do to suggest this, and so I am making the suggestion or the request.

THE COURT: Did Ms. Russell indicate in any way what her reply was going to be? Her objection itself was not a particularly substantive objection.

MR. BURKE: I received an e-mail from her, because I inquired again this morning as to whether she intended to submit something, and she said to me, "I need extra time because I'm not in agreement with the settlement amount to be paid out to me of $36. September 28th is good timing."

THE COURT: Okay. Well, before I address that --

MR. BURKE: May I say one more thing --

THE COURT: Yeah, go ahead.

MR. BURKE: -- about that? I would say that the final approval papers were posted to the settlement website, which is publicly available, the day after we filed it. So September 1st, the papers were publicly available and I believe were properly served on the class in that manner.

I am not aware of any case law that requires me to mail these papers to the objectors, but I again thought it was the right thing to do.

THE COURT: Okay. Well, let me say what I was going to say up top.

MR. BURKE: Okay.

THE COURT: Because it was going to lead me to ask

whether I should keep going or whether people want more time, which is this, that I do intend to find that the proposed settlement is fair, reasonable, and adequate with the exception of the incentive award for reasons that I will explain.

I intend to find that a $20,000 incentive award is disproportionate under the circumstances of this case and that $10,000 is an appropriate award.

With that observation up-front, is there any reason for me not to proceed with my findings with respect to the remainder of the issues on the table?

I think I have the authority, even consistent with the terms of the settlement agreement, to adjust the incentive award and still approve the settlement agreement, but I wanted to pause --

MR. BURKE: Yes.

THE COURT: -- at this moment to see what the parties wanted to do.

MR. BURKE: Of course, Your Honor has that discretion, and I -- what comes to my mind is whether it would be constructive or whether Your Honor would like to hear a couple comments from me on the incentive award issue.

I have been working with Mr. Martin as his lawyer with respect to TCPA claims for quite some time. He -- I would frame him as a sort of champion of TCPA rights. In front of Judge Martin, we obtained a certified class, and class members

in that settlement received over $600 each.

He perseveres in these cases despite real pressure from the defendant and probably from -- internally from himself to settle individually for a premium, and he does not generally do that and he did not do that in this case. Instead, he pushed through for the class.

Mr. Martin and I speak on the phone regularly about what's happening in the case, and we did in this case. There were a lot of difficult turns with discovery in this one, with the Philippines-based entity, the -- there was the auto-dialer company, the New York entity that was uncooperative with producing subpoena responses.

I would also say that Mr. -- I would note that Mr. Martin attended the mediation at JAMS and contributed materially at that mediation.

For those reasons, we would urge Your Honor to accept the proposed $20,000 as an incentive award.

THE COURT: Okay. Assuming I am not persuaded, is there any reason I shouldn't continue in evaluating the settlement and entering an order? And I'll state more reasons about the incentive award as we get to it.

MR. BURKE: Understood. Some of the numbers immaterially changed. We've got, with some cures -- we sent out cure letters to 438 class members. So the number of timely claims is 39,381 as of today. It is possible that we may get

other timely postmarked cures in the future.

There is an issue of deficient claim forms, and those numbers, as identified in the papers, have also altered.

The total number of deficient claims forms as of -- well, I think this is as of Monday, is 5,597. The same -- I believe the same number as before, 5,251, were submitted by class members, but they have the wrong phone number on them. 438 were submitted by someone who appeared to be associated with a class member but had something wrong with it, like it was unsigned. And then 134 were received that had no apparent relationship to any class member.

I think that the -- you know, and so those are the change in the numbers.

THE COURT: The difference between the 5,251 and the 5,597 is -- I guess is the 5,251 a subset of the 5,597 or are those two separate pools of deficient claims?

MR. BURKE: Subset.

THE COURT: Okay. And then is the difference -- what's the difference like in terms of quality of deficiency or the reason for deficiency or --

MR. BURKE: Right. So the best but deficient claims are the 5251. Those are -- appear to have come from class members but have the wrong phone number. Then -- and, Judge, I haven't added these up. We were just going over them today. But 438 were unsigned. 134 appear to have no relationship to

the -- to any class member.

And I should say there is some float here because we have 346 that were cured of the unsigned. So we sent -- oh, gosh. We sent 572 cure letters. So these are -- we sent cure letters to all of the deficient claimants except for the 5251.

THE COURT: Okay. So the -- I am -- what I am trying to do is make sure I understand who would remain in the deficient category and not get a claim approved if I were to agree with the parties' proposal, which is that we should include the 5251 in the claims. And so we would be talking about some group of people whose claims were deficient and are not associated with a phone number that's been identified as being in the class.

MR. BURKE: So we sent out 572 cure letters and 226 remain not responded to. Additionally, there are 426 late claims. That 426 is not included in the deficient numbers that I've been -- 426 late claims.

THE COURT: Okay. Well, I conclude that the 426 late claims should be allowed and the 5,251 deficient claims that are nevertheless associated reliably with a class member should also be allowed. Any other remaining claims that are deficient are deficient and won't be able to be compensated.

MR. BURKE: Perhaps other -- unless we receive a cure?

THE COURT: Unless a cure is received.

MR. BURKE: Very well.

THE COURT: And the claims administration process can take care of that.

MR. BURKE: Yes.

THE COURT: All right. Okay. So with those numbers in mind, I don't think that changes roughly our participation rates or our -- the overall benefit to individual claimants who are going to be receiving some compensation.

MR. BURKE: It --

THE COURT: Is that --

MR. BURKE: It will modify things a little bit, but people will receive $36, roughly, and it bumps our participation rate a few percentage points.

THE COURT: Okay. Okay. Well, with those initial comments and findings and updates from the parties, is there anything the defense wants to submit or add other than what's in the papers?

MS. HANSON: No, Your Honor.

THE COURT: Okay. The notice, I find, was effective and advised the class of its rights and provided plain instructions. It reached over 90% of the individual members individually and was available online and more than adequately comported with the rule and due process in notifying the class.

The class should be certified under Rule 23. It's a numerous class, over 290,000 phone numbers.

There are common issues particularly concerning whether there was an ATDS involved or not. The class members' claims are typical. It's all about whether they got the message without consent, and that makes each claim typical.

The plaintiff is an adequate representative. There's no reason to think that his claim is any different than any other class members. And class counsel has adequately represented the interests of the class. There's absolutely no indication here that there's any antagonistic issue between the class and class counsel or the class and the named plaintiff.

There are sufficient issues that predominate, namely, whether an ATDS was used. I think that that would predominate the case. And that class treatment is not only appropriate, but really the best way to have these kinds of claims litigated to resolution. And certainly resolving it as a class is better than having 291,000 separate claims.

My evaluation of the settlement is that it was and is a fair and reasonable and adequate settlement. There was risk in this case, and compromise makes sense here. Vicarious liability in a TCPA case is not without some risk. There is also significant third-party complexity here, the Philippines-based entity, as counsel mentioned earlier. Continued litigation would be costly. And, as we're about to see, the recovery for the class here through settlement is meaningful without having to endure protracted litigation, and

that has real value.

I do conclude from the response rates and what we've seen that the feedback from the class can and should be considered favorable toward the settlement. Given the number of people who bothered to take any step whatsoever, one way or the other, the number that were actually opposed is incredibly small, and I view that as a sign that there is little opposition amongst the class to this resolution.

The best assessment of the fairness of the settlement is to look at the outcome to the class. And in a case involving what I would conclude to be *de minimis* actual damages to any individual class member, 36 or 37 dollars is a good outcome. There are better outcomes that could be had, too, in a TCPA class action to individual class members. It's significantly less than statutory damages to any individual claimant, and I acknowledge that and appreciate that, but as a compromise, it is real money to each individual claimant that they would not have seen without this case that was brought by Mr. Martin. Given the nature of the claim and the violation, I think the outcome to each individual claimant is quite fair.

Let me address the objections. Ms. Russell's objection and her request for additional time to respond is -- the objection is overruled and her request for additional time is denied.

I do find, like all members of the class, that she

had adequate notice of what was happening in the case. And if she had a substantive objection that was supported by something other than a feeling that what she's getting is not enough, she could have made that substantive objection in a more timely manner. And a reply is not required to be afforded to an objector and, in this particular objection's case, I think would not be useful to my evaluation of the overall settlement.

Her objection is that she wishes and wants more than what her individual claim is worth, and I understand that objection, and -- but it's overruled because it does not have the benefit of what I have the benefit of, which is an overall picture of the case as a whole. The benefit to the class as a whole, the elements of litigation, risk assessment, compromise, and the nature of a TCPA claim are all aspects that I think Ms. Russell and her objection don't adequately take into account. So for those reasons, her objection is overruled.

I also find that Ms. Exum has an unreasonable view of the individual value of her claim and a misunderstanding of the nature of class action such that her objection is also overruled.

She was given the option to exclude herself. And if she believes she has $20,000 or more in damages, she has every incentive to pursue it, and she has chosen instead to object and not exclude herself, and her objection is overruled.

As I said before, I have the benefit of seeing the

overall picture of the case and the benefit to the class from this settlement, and the size of the class, and the nature of the violation, all of which leads me to conclude that Ms. Exum's evaluation of the settlement is not a reasonable one, and so her objection is overruled.

I also overrule her objection to the extent she's asking for a delay so that her complaint to the postmaster can be resolved. I find that she received the materials. She had sufficient time to voice her objection. I find that class counsel did not engage in any deception but to the contrary, actually reached out to her, spoke to her about her options, all in an appropriate manner, and advising her appropriately and consistently with counsel's responsibility to the class.

That she didn't like the option of exclusion is not evidence that class counsel is taking any step contrary to the interests of the class. And so accepting her description of events, I conclude that counsel has conducted himself appropriately.

She filed a document that has been docketed as a motion to object. So her motion to object is granted to the extent that her objection is made a part of the record. Her objection itself is overruled.

Mr. Taishoff -- is that how we pronounce it?

MR. BURKE: I believe so.

THE COURT: Okay. Mr. Taishoff has a similar

objection to the others, which I would call a small P political objection to class actions and the legal profession, or what has become of the legal profession as he has observed it over the years. And I appreciate those views, but they do not persuade me that this particular settlement is unfair or unreasonable or inadequate.

He does make an objection to the incentive award, and so I will talk about that in a moment. But other than that, his -- and his objection about the tax consequences not being adequately explained is also overruled. Those circumstances are available to all class members, and the class notice was sufficient and apprised the class of what the class needed to know.

The fee petition is approved, and the motion for the attorneys' fee award is granted.

The percentage recovery is reasonable. Percentage recovery is a reasonable fee in this type of case. Class counsel did take on the risk on the front end. The percentage here as a percentage of the overall benefit to the class is around 38%. That is more than a third, which is a benchmark in these types of cases. But this case did involve some additional risk or labor than the typical TCPA case because of the third parties involved.

There was a motion to dismiss which was not a particularly time-consuming motion to litigate as I look on the

docket, but there was also a mediation, all of which suggests that class counsel in no way colluded with the defense to sell out the class and obtain a big payday of the recovery. Instead, I find that class counsel provided a good, fair outcome for the class and fairly vindicated the class' rights under the TCPA. And under those circumstances, the percentage is an appropriate value and compensation for class counsel.

And so that does take me to the incentive award. And I absolutely appreciate the need to have an incentive award that creates exactly what it says it is, which is an incentive, an incentive to bring these types of actions to champion the rights of the consumer, but what that doesn't do for me is distinguish this case from many other similar TCPA cases where smaller incentive awards have been awarded.

The amount of effort that Mr. Martin has put into this case is what I would characterize to be as standard and expected but not over and above the kinds of rigors that a named plaintiff who brings these kinds of cases should be expected to endure. What's been presented to me does not include any rigorous discovery that he had to defend against or sit through a contentious deposition or have his life scrutinized in a way that some named plaintiffs find.

The fact that he has been a plaintiff in other cases and has received an incentive award is noteworthy to me. It ultimately for me cuts a little bit in another way, which is

that I don't know that Mr. Martin needs additional incentive to bring these kinds of cases. And if he has the strength of character and resolve to be the champion that he is, he doesn't need the money to continue to be that standard bearer.

And at bottom, what I look at is the proportion of the incentive award to the overall benefit to the class. And the cases where $20,000 or $25,000 have been the award, where that is discussed and where -- it's not just a settlement where there are no objections and it was approved, but where some rigor was looked at in assessing the incentive award, those cases involving an award of that amount generally involve more money for the class or more effort or hurdles that the named plaintiff had to experience.

And there are some studies about the proportion of the fee incentive award to the class, and I think this is cited in Judge St. Eve's case, *Craftwood Lumber*, where the mean incentive fee award granted in consumer class actions is .08% of the total recovery.

An incentive award of $20,000 here would be 1% of what the class gets, roughly, or .6% of the $3 million, and that's significantly higher than the mean incentive award in consumer class actions. And there are some cases that talk about 1% being an amount that ought to be very heavily scrutinized.

And I flagged this issue at the preliminary approval

hearing, and what I have received in response, including the comments today, doesn't persuade me that $20,000 is an appropriate award when viewed in proportion to what the class is getting and the efforts that Mr. Martin went through.

So I do conclude that $10,000 is an appropriate incentive award. You know, obviously, if counsel wants to address that on his end, that's sort of up to you, but in terms of the incentive award that I am awarding, it's $10,000.

I think I've covered everything that I need to cover in granting final approval, but if I am missing something, please tell me.

I should also add that the change in the incentive award does not, in my view, materially change the benefit to the class or the terms of what this settlement involves such that any additional notice or anything like that is necessary to the class. It really -- the class was well aware that the incentive award was subject to Court approval and would be considered. So what from the class' perspective would end up being a modest change in what they end up seeing is one that they had fair notice of potentially occurring, and so no additional notice would need to occur as a result of this modification.

That, I think, covers everything that I ought to cover.

MR. BURKE: I think so, too, Judge. Your comment

about -- at the end of what -- your comments about the incentive award --

THE COURT: We can -- any musings on my end that are not material to my decision on final approval are just that, musings. I mean, my decision on final approval is that the fee award is an appropriate fee award; that the appropriate incentive award is $10,000; that the overall settlement of $3 million is a fair, adequate, and reasonable settlement for the class; that the class has adequate notice of the case and the terms of the settlement; that objections have been heard and ruled upon; and anything else I said was not material to the approval decision.

MR. BURKE: Very well. Thank you very much.

THE COURT: I think you sent a proposed order. Do you want to send another one?

MR. BURKE: I will, Judge. I looked at it before the hearing, and there are some things that need to be filled in that happened here, for example, who showed up. So we'll get that put together and we'll try to get it to you this afternoon, if not tomorrow.

THE COURT: Okay. When that comes in, I'll review it and likely enter it.

MR. BURKE: Thank you very much.

THE COURT: Okay. Thank you.

MR. MAROVITCH: Thank you, Your Honor.

MS. HANSON: Thank you.

(Proceedings concluded.)

C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the HONORABLE MANISH S. SHAH, one of the Judges of said Court, at Chicago, Illinois, on September 16, 2015.

/s/ Colleen M. Conway, CSR,RMR,CRR — *08/24/16*

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date